APPEAL NO. 022544
FILED NOVEMBER 12, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on August 16, 2002. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth quarter. The claimant appeals that determination and the respondent (carrier) responds, urging affirmance.

DECISION

Reversed and rendered.

We first note that in Finding of Fact No. 9 the hearing officer incorrectly cited to Dr. K narrative report, referring to it as "page 47 of Claimant's exhibit 1" when it is actually "page 47 of Carrier's exhibit 2." That report (without the page number) is also found in Claimant's Exhibit No. 4.

Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and administrative rule requirements for SIBs. At issue is whether the claimant met the good faith job search requirement of Section 408.142(a)(4) through a total inability to work during the qualifying period. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has:

> been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

The record in this case contains the decision of the Appeals Panel concerning the claimant's entitlement to SIBs for the fourth quarter. That decision reversed a determination that the claimant was entitled to fourth quarter SIBs and rendered a decision that she was not so entitled. Texas Workers' Compensation Commission Appeal No. 021329, decided July 16, 2002.

Much of the hearing officer's "Discussion" is a discourse against the idea of peer reviews qualifying as an "other record" within the meaning of Rule 130.102(d)(4). He does not believe that a peer review is a record, and he again (as he did for the fourth quarter) makes a specific finding, Finding of Fact No. 18, that "[t]he report of [Dr. C] is a peer review and not a 'record' as contemplated by Rule 130.102(d)(4)." As stated in Appeal No. 021329, this finding is error. *See also* Texas Workers' Compensation Commission Appeal No. 012309, decided November 9, 2001, where we first told this hearing officer that he was wrong in his finding on this subject. We hold again that this is an erroneous finding. We reiterate, however, that the hearing officer still has the

obligation to judge the evidence presented in each case, to include peer review reports, and to determine the weight and credibility of the evidence. Certainly, the fact that a peer review doctor has not personally examined the claimant may make his opinion less credible, and lead the finder of fact to conclude that it does not "show" an ability to work. Other factors, such as the completeness of the records reviewed, consideration of the effects of medications, whether the peer review is reasonably contemporaneous to the qualifying period in issue, and whether the peer review is accurate or based upon erroneous information, opinions, or suppositions, are all relevant in assessing whether the peer review report "shows" an ability to work. The hearing officer erred when he rejected the peer review out of hand; as with any other record which is asserted as showing an ability to work, he was obligated to make specific findings that the peer review was not credible before rejecting it.

Having said the above, we need not remand this case on this point because we can infer an implicit finding by the hearing officer that the peer review is not credible as an "other record" showing that the claimant is able to return to work. We note that the carrier-selected required medical examination (RME) doctor, Dr. B, submitted a supplemental report dated April 24, 2002, which, although not mentioned at all by the hearing officer, makes clear how the compensable injury caused a total inability to work. The RME doctor's latest report is subsequent to the peer review report and could not have been considered by the peer review doctor, further lessening the value of the peer review report.

The crucial determination in this case, however, is the hearing officer's determination that the claimant has a total inability to work "due to a combination of her medical conditions and her compensable injury," and that she "would have some ability to work were it not for her other medical conditions which are unrelated to her employment." These findings are overbroad, as the first part of Rule 130.102(d)(4) is concerned with whether the claimant has been unable to perform any type of work in any capacity, and does not specify that the compensable injury be the only reason that the claimant is unable to work. It is axiomatic, in case law having to do with aggravation, that the employer accepts the employee as he is when he enters employment. Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723 (Tex. Civ. App.-Dallas 1967, no writ). An incident may cause injury where there is preexisting infirmity where no injury might result in a sound employee, but a predisposing bodily infirmity will not preclude compensation. Sowell v. Travelers Insurance Company, 374 S.W.2d 412 (Tex. 1963). Analogously, it can be said in the SIBs arena that the compensable injury, in combination with the preexisting bodily infirmity, can result in a complete inability to work. The evidence sufficiently supports a determination that the claimant is unable to work and Finding of Fact No. 19 is reversed as against the great weight and preponderance of the evidence.

The second part of Rule 130.102(d)(4) does require that the claimant provide a "narrative report from a doctor which specifically explains how the injury causes a total inability to work." The hearing officer referred to the narrative of Dr. K, and the evidence sufficiently supports this factual determination. The report of the RME doctor from his

April 24, 2002, examination of the claimant is also a narrative which explains how the claimant's injury causes her total inability to work.

The third part of this Rule requires that there be no "other records" that show that the injured employee is able to return to work. The hearing officer could find that the peer review does not "show" that the claimant is able to return to work given the other evidence from this qualifying period. The hearing officer found that the claimant was able to work prior to the compensable injuries, despite her hypertension, diabetes, and obesity, but that the combination of the compensable injuries and her medical conditions make her unable to work. To the extent that the peer review doctor and any other medical reports take the position that the compensable injuries alone do not preclude the claimant from working, we reiterate the principle that the employer takes the claimant as he finds him or her. Texas Workers' Compensation Commission Appeal No. 92040, decided March 16, 1992. The claimant had the preexisting conditions and was able to work; it is the additional effect of the compensable injuries which has pushed the claimant past the point of being able to return to work. Not one of the medical records in this case show that the claimant is able to return to work, when her entire medical condition is considered.

We acknowledge that the Appeals Panel reversed this hearing officer's decision and order with respect to the fourth quarter SIBs on the grounds that the peer review was an "other record" that showed that the claimant had an ability to work. However, each SIBs quarter stands on its own facts. Texas Workers' Compensation Commission Appeal No. 961424, decided September 5, 1996. The evidence in this case is different from the evidence presented for the fourth quarter, most especially in the report of the RME doctor, Dr. B, who examined the claimant in April 2002 and set out how her injury caused a total inability to work. Neither the April 17, 2002, report from the claimant's treating doctor nor the RME doctor's report of April 24, 2002, were reviewed by the peer review doctor, but both clearly indicate that the claimant has a total inability to work and explain how this is caused by the compensable injuries. A peer review report is only as "current" as the records it evaluates. Since the peer review doctor did not review any medical records past July 2001, and the functional capacity evaluation he refers to as showing a sedentary ability to work is from March 2001 (and contradicts Dr. B's April 2002 report), the hearing officer could conclude that there is no longer another record which "shows" an ability to work.

Finding that the hearing officer erred in concluding that the claimant had some ability to work, we conclude that the great weight and preponderance of the evidence of record shows that the claimant met the requirements of Rule 130.102(d)(4) for entitlement to SIBs for the fifth quarter. Accordingly, we reverse the decision of the hearing officer to the contrary, and render a new decision and order that the claimant is entitled to fifth quarter SIBs.

The true corporate name of the insurance carrier is **RCH PROTECT COOPERATIVE** and the name and address of its registered agent for service of process is

KEVIN REID
1801 S. MOPAC, SUITE 300
AUSTIN, TEXAS 78701.

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Michael B. McShane
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Gary L. Kilgore
Appeals Judge